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IN THE

Supreme Court of the United States

October Term, 1954

No. 880

HAROLD I. CAMMER,

Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

CHARLES E. FORD,
416 Fifth Street, N.W.,
Washington, D. C.,
Counsel for Petitioner.

SUPREME PRINTING CO., INC., 114 WORTH STREET, N. Y. 13. BEEKMAN 3-2520
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MISCELLANEOUS:

Jahoda and Cook, *Security Measures and Freedom of Thought: An Exploratory Study of the Impact of Loyalty and Security Programs*, 61 Yale L. J. 295 6

IN THE

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No.

HAROLD L. CAMMER,

Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Petitioner, Harold L. Cammer, an attorney at law, prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the District of Columbia (R. 52, Appendix A herein), which (Judge Fahy dissenting) affirmed a judgment of the United States District Court for the District of Columbia, entered June 21, 1954, convicting the petitioner of criminal contempt.

Opinions Below

The opinions in the Court of Appeals (R. 35-51, Appendix B herein) are not yet officially reported. They are printed with the judgment at pages 17-34 hereof. The memorandum opinion of the District Court (R. 32a-33a) is reported at 122 F. Supp. 388.

Jurisdiction

The judgment of the court below was dated May 5, 1955 and was entered the same day. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1). The district court asserted jurisdiction under 18 U. S. C. § 401(2).

Questions Presented

1. Whether it is "misbehavior" under the contempt statute (18 U. S. C. §401) for an attorney, in preparation for a pretrial challenge to the qualifications of grand jurors who returned the indictment, a majority of whom were government employees, and acting in reliance upon recent and direct precedent, to address to such employees, after they had returned the indictment but before they had been discharged, a questionnaire designed solely to ascertain the effect of the loyalty and security programs upon their ability to act impartially in a case involving issues of Communism.

2. Whether such conduct was in an "official transaction" within the meaning of 18 U. S. C. § 401 (2).

3. Whether the petitioner could be adjudged in criminal contempt where the district court found that "it is not without doubt, on the record before the Court, as to whether respondent's acts were committed in conscious wrong," and where it made no finding that petitioner intended to obstruct or did obstruct justice or that he was guilty beyond a reasonable doubt.

Statute Involved

18 U. S. C. (1940) (2):

"A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as . . .

"(2) Misbehavior of any of its officers in their official transactions; . . ."

Statement of the Case

The proceeding was instituted in the district court by an order to show cause and supporting petition why petitioner should not be punished for criminal contempt for misbehavior in his official transactions as an officer of the court in violation of 18 U. S. C. (1940) (2) (R. 1a-8a). Petitioner filed an answer (R. 8a-15a) and the case was decided on the pleadings by the District Court, sitting without a jury. The following are the undisputed facts:

Petitioner was attorney for the defendant in *United States* v. *Gold* (Criminal No. 1344-53, D. C., D. Col.) in which Gold was charged with having filed a false non-Communist affidavit under the Taft-Hartley Act.

A majority of the grand jury which had returned the Gold indictment were government employees. Petitioner undertook to prepare a pre-trial motion for a hearing as to the ability of these employees to act impartially, in view of the loyalty and security programs, in a case involving official charges of Communism.

In the light of the decisions of this Court in *United States* v. *Wood*, 299 U. S. 123, *Dennis* v. *United States*, 339 U. S. 162, 171-2, and *Frazier* v. *United States*, 335 U. S. 497, petitioner was faced with the necessity of ascertaining the

existence of bias in the particular case beyond the mere fact of government employment. As the basis for his contemplated motion petitioner therefore sent to the government employees on the grand jury, over his signature, a letter and questionnaire (R. 4a-6a) concerning the effect of the loyalty and security programs upon their ability to act impartially in such a case. *Cf. Morford* v. *United States*, 339 U. S. 258; *Dennis* v. *United States*, 339 U. S. 162, 170, note 4.

The letter did not refer to the facts or merits of the *Gold* case in any way, nor did it contain any suggestion of criticism of the grand jurors. It was copied verbatim, except for names, from a letter on file in the district court in another, unrelated case which had involved the same issue (*United States* v. *Weinberg*, Criminal No. 829-52, D. C., D. Col.). That letter had been sent by Joseph A. Fanelli, a member of the District bar, while serving as Weinberg's counsel, and had been presented by him in support of a motion for a hearing in that case (R. 16a-22a). Petitioner knew that in the *Weinberg* case one district judge had ruled that a motion challenging government-employed grand jurors would not justify a hearing on the subject because Weinberg's counsel had not himself first "contacted" the grand jurors. Petitioner also knew that after Weinberg's counsel had sent a similar questionnaire to the grand jurors the counsel had not been criticized by either the government or the court [1] (R. 10a-12a).

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[1] Mr. Fanelli had received no replies to the questionnaire and had presented this as a reason for invoking the assistance of the court through a hearing. Judge Holtzoff denied the application saying that:

> "Let's look at your questionnaire. Personally, if I were a Grand Juror, I would consider it a presumption if that questionnaire were sent me and I would throw it in the waste basket, in the first place; and in the second place, gentlemen, I think you are overlooking the basic philosophy of a Grand Jury.

The letter which petitioner sent to the government-employed grand jurors read as follows:

> "Dear (Sir) or (Madam):
>
> I am counsel for the defendant, Mr. Ben Gold, in the above-entitled proceeding. I am writing you and all of the other Federal government employees who sat on the Grand Jury which indicted Mr. Gold. I do this in the interest of the fair administration of criminal justice.
>
> In an effort to learn the effect of the loyalty program on jurors from the Federal government, I ask you please to answer the enclosed questionnaire as objectively as possible and return it to me as soon as possible. I am requesting the other grand jurors who are Federal government employees to do the same. The questionnaire does not seek, and I do not want any information concerning the proceedings or deliberations of the Grand Jury on which you sat.
>
> Answering the questionnaire puts you to some unavoidable trouble. But it is, as you will know, your duty as a citizen to help enlighten the court

---

"A petit jury has to be unbiased and to be impartial. A Grand Jury doesn't have to be impartial. In fact, a Grand Jury can start an investigation of its own motion. If it were impartial it couldn't do that.

"The history of the institution of Grand Juries indicate that you may not challenge a Grand Juror for bias as you may a petit juror. Moreover, this indictment was found in May, 1952.

"Let this motion be filed, and denied."

Judge Holtzoff did not suggest that counsel had engaged in any impropriety in sending the questionnaire. The issue concerning the right to a hearing on the showing made was later mooted because of Weinberg's acquittal after trial, but was presented in the *Gold* appeal, now pending in the Court of Appeals.

on an issue which affects the liberty of a citizen on trial in a criminal case.

A self-addressed stamped envelope is enclosed for your convenience. Promptness in your reply is important, and will be appreciated.

Sincerely,

HAROLD I. CAMMER"

The questionnaire enclosed with the letter was based on *Morford* v. *United States, supra*, and *Dennis* v. *United States, supra*. It was a slightly condensed version of the one propounded in the *Weinberg* case and was patterned after one used in a recent study of the effect of the loyalty and security programs on government employees (*Jahoda and Cook, Security Measures and Freedom of Thought: An Exploratory Study of Loyalty and Security Programs*; 61 Yale Law Journal at 331-3). Moreover, petitioner had consulted with Dr. Jahoda, a co-author of that study and Associate Professor of Social Psychology at New York University, in its preparation (R. 12a).

The questionnaire was a necessary prerequisite to an application for a hearing under an existing ruling of the district court. The government had successfully urged in the then recently decided *Emspak* case (*United States* v. *Emspak*, 203 F. 2d 54 [C. A., D. Col., 1952]) and upon oral argument before Judge Kirkland on November 17, 1952 in *Weinberg*, that a defendant who desired a hearing on the qualifications of government employees in such a case was obliged to resort to self-help before applying to the court. The government had urged in *Emspak* that before moving for a hearing the defendant was first obliged himself to

"interview" the individual grand jurors to determine preliminarily whether bias existed in fact.[2]

And in the *Weinberg* case the government had successfully urged that it was necessary that the defendant "contact" the grand jurors as a condition precedent to a motion for a hearing, and Judge Kirkland had adopted this position. He ruled that there was "nothing to prevent counsel, if he sees fit, contacting those 15 members and inquiring only of one subject, whether or not they had any personal bias toward . . . (defendant) and on that account, did they return the indictment" (R. 17a).

At the time Judge Kirkland had made this ruling, the grand jury which had returned the *Weinberg* indictment had not been discharged. At the time that petitioner sent his letter and questionnaire he knew that the grand jury which had returned the *Gold* indictment had not been discharged. Thereafter petitioner, having learned that District Judge Pine had questioned the propriety of the sending of the questionnaire, made a full report of the matter to Judge Pine (R. 23a-27a) and later submitted the letter

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[2] In its *Emspak* brief to the Court of Appeals the government had said (pp. 27-8):

> "The appellant in this motion was not only asserting that at least eight of the twelve members of the grand jury indicated in this motion were prejudiced and disqualified, but was promising to prove it if given the opportunity; *yet, there is not the slightest indication in the long motion and offer of proof that an attempt has been made to interview a single one of the persons.* Under all the circumstances it is clear that the court acted properly in denying the motion for a hearing. In the absence of any reason for appellant not making his whole showing in the usual form of affidavits, it can be asserted on this review that the trial judge had exclusive discretion to deny a hearing. *The appellant was trying to get the court to make an investigation which the appellant should have made himself.*" (Italics supplied.)

and questionnaire to the court in support of a motion for a hearing in the *Gold* case (R. 28a-29a).

Nearly eight months later the government instituted this proceeding. On the hearing it did not dispute that petitioner had relied in good faith on the foregoing direct precedent, on the suggestion contained in the government's brief in *Emspak*, on the ruling of Judge Kirkland and on the acquiescence of Judge Holtzoff and of the United States attorney in the *Weinberg* case. And in its memorandum to the district court, the government conceded that there was no intent by petitioner to influence the grand jury and that no such obstruction of justice occurred.[3] Nor did the government dispute that petitioner had no evil intent.

In its opinion, the district court stated that "it is not without doubt, on the record before the Court, as to whether respondent's acts were committed in conscious wrong." The court added: "There seems to be reason to believe respondent may have misconceived the proprieties. What he did was open. There was no opprobrious personal approach to jurors. There is indication respondent may have believed he had a right to propound the questions at the time he did, notwithstanding this Court is of opinion he had not" (R. 32a-33a).

Nevertheless, the district court found the petitioner guilty but concluded that "under these circumstances, in

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[3] The government's memorandum to the district court said (at p. 8):

"Mr. Cammer disclaims any effort to influence the grand jury. The Government does not charge such an obstruction of justice."

And at page 18:

"Here it is not charged that Mr. Cammer's conduct amounts to an obstruction of justice in that it amounts to influencing a grand juror under Title 18 § 1503 U. S. C."

the absence of a positive declaration by the Court, it may be unjust to severely punish respondent as otherwise would be required." It thereupon imposed a fine of $100.

The memorandum of the district court and the opinions below neither detail nor discuss the defenses set up in petitioner's answer. The court below held that petitioner's conduct was "misbehavior" in an "official transaction." Circuit Judge Fahy dissented.

Reasons for Granting the Writ

1. "Preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury." *Dennis* v. *United States*, 339 U. S. 162, 171-2. See also *United States* v. *Wood*, 299 U. S. 123, at 145, 150.

The criminal code is explicit in prohibiting any communication with a juror, grand or petit, to influence a pending matter. 18 U. S. C. § 1504. But it has never been thought that inquiry into the legal qualifications of a juror is within this prohibited area.[4] Indeed, since an indictment returned by or a trial before an unqualified, biased jury is a denial of due process, this Court has repeatedly held that the way is open in every case to raise a contention of bias from the realm of speculation to the realm of fact. *Dennis* v. *United States, supra*; *Morford* v. *United States*, 339 U. S. 258; *United States* v. *Wood, supra*; *Frazier* v. *United States, supra*.

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[4] The characterization of the questionnaire by the court below and the district courts as "harassing" is squarely contra to *Morford* and *Dennis, supra*. Moreover, if the fact of government employment did not affect the qualifications of the government employees, questions concerning the effect of such employment are harmless. And if such employment affected their qualifications, the integrity of the administration of justice required disclosure of that fact. *Frazier* v. *United States, supra*; *Wood* v. *United States, supra*.

Nevertheless, despite repeated efforts and impressive showings, no defendant has succeeded in obtaining a hearing on the issue of bias of government-employed grand jurors in the District of Columbia. This failure has been due to the government's successful contention that the defendant must show bias beyond the fact of government employment, and that he must resort to self-help by himself interviewing or contacting the jurors before applying to the court for help.

The opinion below therefore constitutes a double trap. On the one hand, it effectively forecloses the only way, under Judge Kirkland's ruling in *Weinberg* and the government's position in *Emspak*, by which the defendant may inquire to discover whether there is a basis for a hearing; on the other, it has stigmatized as a criminal an attorney who performed his obligation in good faith in reliance on precedent the validity of which had not previously been questioned, to meet the standard imposed by the district court. If a defendant may not obtain a hearing unless he first interviews or contacts the grand jurors, and if his attorney is a criminal because he openly and in good faith undertakes the necessary inquiry, then the defendant's right to show disqualification is not preserved; but becomes a snare and delusion. Moreover, if lawyers may not act on a line of cases in this Court consistently and steadfastly adhered to, upon the government's own interpretation of the action required under those cases, upon district court rulings based thereon, and upon the practice of members of the bar consistent therewith, except under peril of a conviction for contempt upon a sudden reversal of the authorities in the contempt proceeding itself, how can they act at all? Whether petitioner's conduct can be condemned as "misbehavior" within the statute under these circumstances is a matter on which this Court should pass.

2. Rule 6(b) of the Federal Rules of Criminal Procedure provides for a challenge to the qualifications of the grand jury at any time, either before or after the return of the indictment and, therefore, before it is discharged. The only condition is the requirement of diligence. *United States* v. *Gale*, 109 U. S. 65; *Burchett* v. *United States*, 194 F. 821 (4th Cir. 1912); *Wright* v. *United States*, 165 F. 2d 405 (8th Cir. 1918); *Redmon* v. *Squier*, 162 F. 2d 195 (9th Cir. 1947).

Having returned the indictment, the grand jury had no further function in the *Gold* case. Therefore it was immaterial that it had not been discharged and was then sitting on other matters. That fact could have no effect upon Gold's right to explore the jurors' qualifications to have acted in his case, where the grand jury was *functus officio*. Otherwise a defendant indicted toward the end of the grand jury term would have the right to explore for the purpose of adducing facts in support of the challenge, but one indicted early in the term would be denied that right. Since grand juries may sit for eighteen months, the right to prepare a challenge in such a case would be effectively nullified. For on the one hand, under Judge Kirkland's ruling, the defendant was first obliged to interview or contact the grand jurors to determine whether a basis for the challenge existed, and on the other he was faced with the need of filing a challenge within the time allowed for motions. And, as noted, Judge Kirkland's ruling was made at a time when the grand jury had not been discharged.

Thus the issues here presented raise important questions respecting the way in which an attorney for a defendant in a criminal case may prepare a pre-trial test of the qualifications of the grand jury which returned the indictment in an area where the problem constantly recurs and which is of vital importance to the administration of criminal justice.

3. In *Nye* v. *United States*, 313 U. S. 33, this Court, expressly overruling *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402, firmly laid to rest the "reasonable tendency" test by which the contempt statute has been previously construed and applied. Since *Nye* this Court has consistently reaffirmed the view that the statute was intended drastically to limit the power of the courts to punish for crime without indictment or jury trial. *In re Michael*, 326 U. S. 224, 227; *Bridges* v. *California*, 314 U. S. 252, 264; *Pennekamp* v. *Florida*, 328 U. S. 331, 344; *Craig* v. *Harney*, 331 U. S. 367, 372.

The majority below has departed from these holdings in several critical respects.

(a) On the authority of *Ex parte Bradley*, 7 Wall., at 374, it has made the test of "official transaction" turn on whether the "actions occurred when he was directly engaged 'in the practice of the profession.'" This vague test, extracted from a case where an attorney assaulted a judge in the courtroom, is in conflict, as Judge Fahy points out, with the narrow meaning which this Court has accorded to that phrase in *In re Michael*, 326 U. S. 224, at 229, and to the holdings of the First and Sixth Circuits in *Farese* v. *United States*, 209 F. 2d 312, at 315 (1st Cir., 1954), and *Schmidt* v. *United States*, 124 F. 2d 394 (6th Cir., 1941).[5]

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[5] The court below erroneously read *Schmidt* as "primarily" concerned with the first rather than the second subsection of 18 U. S. C. § 401. There an attorney had his client obtain from grand jurors affidavits concerning their proceedings and deliberations and filed them in support of a motion to quash the indictment. He was convicted of contempt "for filing these affidavits contrary to and in violation of the oath of said grand jurors, without application to or permission from the Court at the time when said grand jurors were subject to recall and had not been discharged." The Court held that the conduct was not "misbehavior" in an "official transaction" within the second subsection and it placed no primary emphasis on the first subsection.

(5) The opinion of the majority below implies vitality in a series of cases bottomed on the "reasonable tendency" rule of *Toledo Newspaper* which was cast out by *Nye*. *Sinclair* v. *United States*, 279 U. S. 749, although entirely distinguishable on the facts, expressly rested on the *Toledo* rule which *Nye* overruled. *Ex parte Bradley*, *supra*, decided in 1868, contains dicta of questionable validity in the light of *Nye*. *Tanner* v. *United States*, 62 F. 2d 601 (10th Cir., 1933), a case where an attorney, in the courthouse, berated a juror because he had returned an inadequate verdict, was decided eight years before *Nye*. *Di Farese* v. *United States*, *supra*.

(c) This Court has held that criminal intent is a material and essential ingredient of the crime of criminal contempt and must be proved beyond a reasonable doubt in order to sustain a conviction. *Ex parte Hudgings*, 249 U. S. 378; see also *Gompers* v. *Buck's Stove & Range Co.*, 221 U. S. 418. See also *Blim* v. *United States*, 68 F. 2d 483 (7th Cir., 1934), and the cases there cited at 487. It has further repeatedly held that obstruction must clearly be shown in every case where the contempt power is exerted. *In re Michael*, *supra*; *Ex parte Hudgings*, *supra*.

The district court did not find an obstruction of justice. The government conceded that there was no intent or effort to influence the grand jury.[6] Thus the court below has so far departed from constitutional standards as to sanction a summary conviction of crime in a case where proof of an essential ingredient of the offense was not established beyond a reasonable doubt.

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[6] See footnote 3, *supra*. However, the majority below wrote that "it is immaterial whether Cammer was motivated by an evil purpose, or not, but were we pressed on the point we could readily find that he was." The district court had found that it was in doubt that petitioner had an evil intent. Since the case was before the Court of Appeals on the petition and answer, and in view of the government's concessions, we submit that there is absolutely no basis for the majority's suggestion.

4. The District Court commenced its opinion with the following:

> "Nothing has changed its understanding that whenever a case is pending before judge or jury, no pressure or harassment of any character should be exercised on one who must make a decision. Unfortunately within late years there has been a tendency to bring such pressures and harassment. For a time, there was picketing of courts during trials. Then there came about unseemly conduct of counsel in court, requiring disciplining of counsel. Now it appears searching questionnaires have been submitted to grand jurors while they are considering certain types of cases."

Thus the court below has affirmed the criminal stigmatization of the petitioner under circumstances which strongly suggest that the petitioner was prejudiced before the district court because he appeared in that "certain type of case" where his client was charged with a crime related to Communism. Petitioner has had nothing to do with picketing any courts. Nor has he engaged in unseemly conduct in court or elsewhere requiring his discipline.[7] And "searching" inquiry as to the qualifications

[7] It is appropriate to observe that at the conclusion of the *Gold* case, Judge McLaughlin who had presided at the trial, commented on the high professional standards observed and the care and thoroughness with which defense counsel had conducted the defense as follows (Gold transcript for April 27, 1954, p. 70):

> "This case consumed, as counsel knows a period of six weeks in trial. It was a very vigrously contested case, one in which counsel on both sides expertly represented their respective clients. And the Court is not aware of another case in which the Court has participated in which every conceivable question was more carefully raised, and rulings thereon more carefully preserved in the record. The Court can do no less than commend counsel for their zeal in their representation of their respective clients."

of jurors cannot be assimilated to picketing a trial or indecorous conduct. Indeed, this Court has often said that such inquiry is essential to the fair administration of criminal justice. *Morford* v. *United States*, 339 U. S. 258; *Dennis* v. *United States*, 339 U. S. 162, 170, note 4.

The problem of obtaining counsel, and the sanctions and pressures against counsel, in cases involving issues of Communism are a serious problem in the administration of justice. This Court should not permit an implication that an attorney has been convicted because of the political views attributed to his client, or because of the conduct of others in cases involving Communism. Nor should this Court allow an attorney to be held guilty of criminal contempt when, acting in good faith, he followed a course insisted upon by the government in previous cases and for which direct and recent precedent existed.

CONCLUSION

The writ of certiorari should be issued and the judgment below reversed.

Respectfully submitted,

CHARLES E. FORD,
416 Fifth Street, N.W.,
Washington, D. C.,
Counsel for Petitioner.

APPENDIX A

Judgment Appealed From

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12353 April Term, 1953

HAROLD I. CAMMER,

Appellant;

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before:

WILBUR K. MILLER, FAHY and DANAHER,

Circuit Judges.

This cause came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Dated: May 5, 1955.

Per Circuit Judge DANAHER.

Separate dissenting opinion by Circuit Judge FAHY.

APPENDIX B

Opinions in Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12353

HAROLD I. CAMMER,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Decided May 5, 1955

Mr. CHARLES E. FORD for appellant.

Mr. OLIVER GASCH, Assistant United States Attorney, with whom Messrs. LEO A. ROVER, United States Attorney, and LEWIS CARROLL, Assistant United States Attorney, were on the brief, for appellee.

Before WILBUR K. MILLER, FAHY and DANAHER, Circuit Judges.

DANAHER, Circuit Judge: Cammer appeals from an order adjudging him guilty of criminal contempt. The essential facts are that Cammer is attorney of record for one Gold; on August 28, 1953, an indictment was returned

against Gold by the May 1953 grand jury; the grand jury after Gold's indictment subpoenaed other persons represented by Cammer: on September 22, 1953, Cammer appeared in the District Court on behalf of these other persons and moved to quash and vacate the subpoenas served upon them; on this same day and the day following, September 22 and 23, 1953, Cammer sent identical letters and questionnaires to some fifteen members of the grand jury who were federal employees, and in so doing, Cammer acted without the permission or knowledge of the District Court. The questionnaires related in general to the effect of the government's loyalty program on the grand jurors. The letter accompanying the questionnaire stated that it was being submitted "in the interest of the fair administration of criminal justice" and urged that it was the recipient's "duty as a citizen to help enlighten the court on an issue which affects the liberty of a citizen on trial in a criminal case."

The trial judge found that the questionnaires harassed the jurors and impinged upon their freedom of thought and decision. He described Cammer's action as "intolerable" but concluded that a fine of $100 would be sufficient punishment since there was some doubt as to whether Cammer's acts "were committed in conscious wrong."

Cammer's contempt was adjudged specifically under § 401 of the Federal Contempt Statute, 18 U. S. C. § 401 (1952),[1] which provides as follows:

> "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none others, as—

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[1] Although *Nye* v. *United States*, 313 U. S. 33 (1941), involves a complaint for violation of the first subsection of 18 U. S. C. § 401, at page 44 *et seq.* is presented important background material. Earlier treatment of the derivation of the statute is presented by Mr. Justice Harlan in Savin, Petitioner, 131 U. S. 267, 274 *et seq.* (1889).

"(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

"(2) Misbehavior of any of its officers in their official transactions;

"(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

The government's application for an order to show cause was predicated upon acts and conduct said to constitute a violation of subsection (2) of the foregoing section. Although appellant set up certain defenses which will not be detailed, his answer admitted all allegations of the government's petition except the following:

"The acts and conduct of Harold I. Cammer, as set forth in the foregoing paragraphs, constitute:

"Misbehavior by an officer of this Court in his official transactions with this Court, in violation of section 401, Title 18 U. S. C."

The power of Congress to legislate with respect to the contempt powers of the federal courts, other than the Supreme Court, is not open to question. "These courts were created by acts of Congress. Their powers and duties depend upon the act calling them into existence, or subsequent acts extending or limiting their jurisdiction. The act of 1831 is, therefore, to them the law specifying the cases in which summary punishment for contempts may be inflicted." *Ex parte Robinson*, 19 Wall. 505, 510-511 (U. S. 1873). The contempt statute has been described as an attempt by Congress "drastically" to limit the contempt powers of the courts. *In re Michael*, 326 U. S. 224, 227 (1945); *Nye* v. *United States*, 313 U. S. 33, 44-48 (1941). The *Michael* and *Nye* cases emphasize, however, that the

main concern of Congress and the Supreme Court is not to protect contemptuous conduct, but to prevent abuses which may result from summary punishment.

Under the terms of 18 U. S. C. § 401(2), we inquire whether: (1) Cammer was an officer of the court, (2) engaged in an official transaction, (3) whose conduct constituted misbehavior. For the reasons which follow, the majority answers these questions affirmatively, though with great respect for the contrary views of our colleague.

1. *Cammer was an officer of the court.*

It seems clear that attorneys are officers of the court within the intendment of the statute. In *Ex parte Garland*, 4 Wall. 333, 378 (U. S. 1866), Justice Field said: "[Attorneys] are officers of the court, admitted as such by its order, upon evidence of their possessing sufficient legal learning and fair private character. . . . The order of admission is the judgment of the court that the parties possess the requisite qualifications as attorneys and counsellors, and are entitled to appear as such and conduct causes therein. From its entry the parties become officers of the court, and are responsible to it for professional misconduct. They hold their office during good behavior, and can only be deprived of it for misconduct ascertained and declared by the judgment of the court after opportunity to be heard has been afforded." See also, *Ex parte Robinson*, 19 Wall. 505, 512 (U. S. 1873); *Ex parte Bradley*, 7 Wall. 364, 374 (U. S. 1868), and *Tanner* v. *United States*, 62 F. 2d 601 (10th Cir. 1932), *cert. denied*, 289 U. S. 746 (1933), all of which involved contempt situations.[2]

[2] No point is made of the fact that the District Court admitted Cammer only *pro hac vice*. This would appear to be immaterial since the alleged contempt occurred in connection with the specific cases in which he was authorized to appear. See *Bowles* v. *United States*, 50 F. 2d 848, 851 (4th Cir. 1931), *cert. denied*, 284 U. S. 648 (1931).

2. *Cammer was engaged in an official transaction.*

That Cammer, as an "officer of the court," was engaged in an official transaction is clear. The facts show beyond dispute that Cammer's actions occurred while he was directly engaged "in the practice of the profession." *Ex parte Bradley, supra*, 7 Wall. at 374. The grand jury had just indicted one of his clients, and as he knew, currently had others under investigation. Each letter identified Cammer as attorney for the indicted client, Gold, and stated that he was addressing it to all federal government employees "who sat on the Grand Jury which indicted Mr. Gold." Cammer's letter, appealing directly to the grand jurors' purported duty "to help enlighten the court," transmitted a questionnaire containing inquiries, a few samples of which will demonstrate its inevitable impact on the grand jurors.[3]

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[3] "In what department of the Federal Government are you employed?

* * *

"Do you think that it is wise or safe for a government employee to express views on a controversial question different from the position of the Government?

* * *

"Do you think a government employee could get into trouble if he gave a truthful character affidavit for use at a hearing in which the fellow employee is charged with disloyalty to his Government?

* * *

"Are you involved in a loyalty proceeding? Have you ever been involved in such a proceeding?

"Are you concerned about possible involvement in a loyalty proceeding in the future?

"Do you believe that a government employee might some day have to explain his action in a loyalty proceeding if, as a juror, he voted to acquit or not to indict a person who was widely publicized as a past or present communist?

* * *

Appendix B

The grand jury is an appendage of the court and "proceedings before it are to be regarded as being proceedings in the court." *Camarota v. United States*, 111 F. 2d 243, 246 (3d Cir. 1940), *cert. denied*, 311 U. S. 651 (1940). See also, *United States v. Smyth*, 104 F. Supp. 283, 291 (N. D. Cal. 1952). The grand jury acts "under the authority of the court," we note in *Savin, Petitioner*, 131 U. S. 267, 277 (1889), which predicated Justice Cardozo's pronouncements "A talesman when accepted as a juror becomes a part or a member of the court," *Clark v. United States*, 289 U. S. 1, 11 (1933), and again at page 12, "A talesman, sworn as a juror, becomes, like an attorney, an officer of the court, and must submit to like restraints." That Cammer, in so communicating with an official arm of the court while conducting the court's business, was engaged in an official transaction cannot be doubted.

In urging that the statute does not apply in such circumstances appellant relies on the *Nye, Michael* and second *Schmidt* (124 F. 2d 177 (6th Cir. 1941)) cases. The *Nye* proceedings, brought under the *first* subsection of 18 U. S. C. § 401, did not involve an officer of the court, and the alleged contemnors, in fact, were not even parties to the litigation. The Court's opinion stated, 313 U. S. at 44: "The question is whether the conduct of petitioners constituted 'misbehavior . . . so near' the present of the court 'as to ob-

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"Do you think that such a vote might affect his employment status in any way, such as possible promotions, assignments, or selection for layoff in the current reductions in force? If so, how?

"Do you believe that a government employee's obligation to the Federal Government and to its program of fight communism would be consistent with his voting to acquit or refuse to indict a man officially charged by our Government with communist activity?

* * *

"Did you mention to or discuss the receipt of this questionnaire with any attorney or representative of the Department of Justice or with your superiors on your job? If so, with whom?"

struct the administration of justice . . . ." Concluding that the words have a geographical connotation, the majority ruled that the reprehensible conduct was not punishable as contempt within the mean of § 401(1) though of a kind which corrupts the judicial process and impedes the administration of justice. The case on its facts has nothing to do with our problem. In the *Michael* case, *supra*, the contemnor, a court appointed trustee had been adjudged guilty of contempt because of "false and evasive" testimony before a grand jury. The issues were not unlike those presented in *Ex parte Hudgings*, 249 U. S. 378 (1919). The Court noted that perjury alone does not constitute an "obstruction" of justice within § 401(1), and that element must be clearly shown where contempt is charged. The opinion cited *Clark* v. *United States*, *supra*, as an example of obstruction where a prospective juror had falsely testified in order to qualify. "It is difficult to conceive of a more effective obstruction to the judicial process, than a juror who has prejudged the case," wrote Justice Black, 326 U. S. at 228, pointing out further that "the mere fact that false swearing is an incident to the obstruction charged does not immunize the culprit from contempt proceedings." But perjury alone did not predicate contempt proceedings under § 401(1), nor could the conviction be sustained under § 401(2) where the contemnor, though an officer of the court, was not engaged in an official transaction while testifying generally before the grand jury. In short, where the charge of perjury could be prosecuted with determination of guilt by a jury, that course, rather than summary contempt action, should be followed where there was lacking the element of obstruction of justice. The *Michael* case offers no comfort to one who either sought to influence the jury as it transacted its business, or whose insinuating and unauthorized communications might have

affected the grand jury's official consideration of the case against Cammer's clients.[4] In the second *Schoridt* case, as is clear from the facts which appear in the court's first opinion (115 F. 2d 394), the court again was concerned primarily with the first, rather than the second subsection of 18 U. S. C. § 401. In fact, it was stated in open court by the Government that no complaint was made in that case under the second subsection. Moreover, while attorneys were involved, they did not themselves make contacts with grand jurors, and their alleged contempts occurred when the court was not in session and grew out of actions they advised the clients to take. In brief, the cases relied upon by appellant may be distinguished, and none involves direct dealing between two officers of the court in a matter of official concern to both, as in the present situation.

3. *Cammer's conduct constituted misbehavior.*

For many practical reasons the courts have sought to protect grand juries in the exercise of their historic and important function, investing their deliberations with the seal of secrecy, protecting the jurors against harassment and otherwise recognizing their valued contributions in

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[4] *Cf. Remmer* v. *United States*, 347 U. S. 227, 229 (1954), where the Court said: "In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. A juror must feel free to exercise his functions without the F.B.I. or anyone else looking over his shoulder. The integrity of jury proceedings must not be jeopardized by unauthorized invasions . . ."

judicial administration." Thus has evolved the rule requiring judicial approval of proposals to penetrate the shield. *Schmidt* v. *United States*, 115 F. 2d 394, 397 (6th Cir. 1940), and cases there cited. See also, *United States* v. *American Medical Ass'n*, 26 F. Supp. 429 (D. D. C. 1939); *In re Bullock*, 103 F. Supp. 639 (D. D. C. 1952)."[6]

Cammer cast aside an unusually convenient opportunity to consult with the judge about his contemplated action when while attorney for Gold who had been indicted, he appeared before the court on the morning of the very day the questionnaires were sent out. He there sought to quash a subpoena duces tecum running to one of Gold's associates, and he knew that the grand jury was continuing its investigation. If he had acted in good faith, he could then have sought judicial supervision, instead of which he went forward with his plan, kept it secret to himself, acted without advice from the court, and yet implied in his letter that it was the jurors' "duty" to the court to respond to the questionnaires.

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[5] E.g., a defendant should not be permitted "to divert and turn back the course of a criminal case from a trial of himself to a trial of the grand jury and the prosecuting officers." *United States* v. *American Medical Ass'n*, 26 F. Supp. 429 (D.D.C. 1939); *United States* v. *Smyth*, 104 F. Supp. 283, 300-302 (N.D. Cal. 1952); *cf. Bradley* v. *Fisher*, 13 Wall. 335, 347-348 (U. S. 1871); *Atwell* v. *United States*, 162 Fed. 97, 100 (4th Cir. 1908).

[6] In the latter case, by the way, the reasons for secrecy are summarized as follows: "1. To prevent the escape of those indicted; 2. To insure the grand jury freedom in its deliberations; 3. To prevent any persons from annoying the grand jurors; 4. To prevent subornation of perjury with witnesses who may testify before the grand jury and later appear at the trial of those indicted by it; 5. To encourage free and untrammeled disclosures by persons who have some information with respect to the commission of crimes, and, 6. To protect the innocent person who is accused but exonerated, from the disclosure of the fact that he has been under investigation." See also, *United States* v. *Amazon Industrial Chemical Corp.*, 55 F. 2d 254, 261 (D. Md. 1931).

Appendix B

The record here amply substantiates a finding of misbehavior. As Judge Laws said in his opinion: "To harass [the jurors] by challenging and lengthy questions while they are deliberating or about to consider cases is intolerable. A timid juror will not fail to be disturbed, possibly influenced. A stalwart juror at least will be disturbed. Such an approach impinges freedom of thought and decision. Jurors will not serve competently if so harassed." Conduct similar in principle to that involved here, has been condemned in many other cases.

In *Sinclair v. United States*, 279 U. S. 749, 765 (1929), the defendants in a criminal case had the jurors kept under surveillance whenever they were not actually within the court house. Investigations also were made concerning encumbrances on the home of one juror and to determine whether another had indicated his views during the trial. The Court upheld an adjudication of criminal contempt on these facts, even though it did not appear that any juror had actualy been approached or communicated with or that any juror was conscious of the surveillance, although some jurors were suspicious. The punishment included heavy fines and imprisonment. Commenting on the conduct of the contemnors, the Court said (279 U. S. at 764-765):

> "That the acts here disclosed, and for which three of the appellants were certainly responsible, tended to obstruct the honest and fair administration of justice we cannot doubt. The jury is an essential instrumentality—an appendage—of the court, the body ordained to pass upon guilt or innocence. Exercise of calm and informed judgment by its members is essential to proper enforcement of law. The most exemplary resent having their footsteps dogged by private detectives. All know that men who accept such employment commonly lack fine scruples, often

wilfully misrepresent innocent conduct and manufacture charges. The mere suspicion that he, his family, and friends are being subjected to surveillance by such persons is enough to destroy the equilibrium of the average juror and render impossible the exercise of calm judgment upon patient consideration. If those fit for juries understand that they may be freely subjected to treatment like that here disclosed, they will either shun the burdens of the service or perform it with disquiet and disgust. Trial by capable juries, in important cases, probably would become an impossibility. . . . We can discover no reasons for emasculating the power of courts to protect themselves against this odious thing."

In *Ex parte Bradley*, 7 Wall. 364, 374 (U. S. 1868), the Court reversed a contempt adjudication against an attorney which had been premised on the first clause of the first section of the Act of March 2, 1831, which is the equivalent of 18 U. S. C. 401(1). In so doing, however, the Court markedly contrasted the power of the courts under like circumstances "to punish attorneys as officers of the same, for misbehavior in the practice of the profession." With respect to this latter power, Mr. Justice Nelson speaking for the Court said (7 Wall. at 374):

"This power has been recognized and enforced ever since the organization of courts, and the admission of attorneys to practice therein. If guilty of fraud against their clients, or of stirring up litigation by corrupt devices, or using the forms of law to further the ends of injustice; in fine, for the commission of any other act of official or personal dishonesty and oppression, they become subject to the summary jurisdiction of the court. Indeed, in every instance where an attorney is charged by affidavit with fraud or mal-

> practice in his profession, contrary to the principles of justice and common honesty, the court, on motion, will order him to appear and answer, and deal with him according as the facts may appear in the case. . . . [T]his is a distinct head of proceeding from that of contempt of court, or of the members thereof, committed in open court, or in immediate view and presence, tending to interrupt its processings, or to impair the respect due to its authority. *This distinction is recognized in the act of 1831, already referred to, which, after providing for personal contempt in presence of the court, authorizes attachments to issue, and summary punishment to be inflicted, for 'the misbehavior of the officers of said courts in their official transactions.'* " (Emphasis supplied.)

In *Tanner v. United States*, 62 F. 2d 601 (10th Cir. 1933), *cert. denied*, 289 U. S. 746 (1933), an attorney after the jury returned its verdict in a case in which he was participating, encountered one of the jurors and proceeded to abuse the juror, who was a banker, for the small amount of damages awarded his client in the trial. The lawyer was adjudged in contempt, was fined $100, and suspended from practice until payment was made. The Court of Appeals upheld this conviction and made this pertinent comment (62 F. 2d at 602):

> "While the jury had returned a verdict in the Woody case in which the juror had sat, he was still an officer of the court and would be called in subsequent cases. Appellant also was an officer of the court. The attack having been made by one officer of the court upon another because of the subject matter of a trial concluded only so far as the return of a verdict by the jury, we are of the opinion while the attack was made outside of the courtroom and after

the jury had returned its verdict, yet the case was still pending, and it was not only the right but the duty of the court to deal with the same. It is unthinkable a court should be so weak or supine, so wanting in constitutional power, as to not be able to protect its officers in the proper discharge of their sworn duty. That a juror, acting under his sworn duty in the administration of justice in one of our national courts, should be so basely accused and humiliated by an interested officer of the court, cannot be thought not to be included in the statutory law above quoted. No doubt jurors, if such conduct as is found in this record should go unpunished, would fear to do their sworn duty in an honest, impartial manner, as must be done in the administration of justice in our courts. We are of the opinion the judgment imposed for the offense by the attorney in this case was well within the statutory power conferred. Aside from this, the court was very moderate in his punishment, and for that the court is to be commended and not criticized for its timely action in this case."

In the first *Schmidt case*, *supra*, 115 F. 2d 394 (6th Cir. 1940), several attorneys advised their clients that they could interrogate members of the grand jury relative to the evidence which had been submitted to it, and upon which indictments against them were based. The clients thereupon approached and interviewed a number of the grand jurors, and obtained affidavits which the attorneys submitted to the court in support of motions to quash the indictments. The attorneys were adjudged in contempt of court for their conduct. Commenting upon the attorneys' action, the court said (115 F. 2d at 396):

"The question of sincerity aside, the fact is that appellants' advice overlooked this oath and caused

their clients and the grand jurors themselves to disregard it. The advice was given directly in the teeth of that clause of the oath which obligated the jurors to secrecy unless they were called upon in a court of justice to make disclosures, and of that portion of the court's charge to the grand jury hereinabove quoted. Advice which caused appellants' clients or the jurors themselves to disregard or ignore the oath was, per se, an unlawful interference with the proceedings of the court, and, however honestly given, was at least a technical contempt."[7]

Cammer urges upon us his alleged lack of intent, that there was an absence of conscious wrong. His reliance upon any such ground for exculpation is definitely misplaced. "In order that one may be held for contempt for communications with jurors, on the ground of the harmful tendency thereof, it is not necessary to prove that the communications had or the acts done were accompanied with a wrongful intent. It is sufficient if such acts and communications were knowingly and wilfully done and had, and had the tendency to influence improperly the action of the jury." *Kelly v. United States*, 250 Fed. 947, 950 (9th Cir. 1918), *cert. denied*, 248 U. S. 585 (1919). In *Duke* v. *United States*, 90 F. 2d 840 (4th Cir. 1937), *cert. denied*, 302 U. S. 685 (1937), which arose under a statute which now appears at 18 U. S. C. § 1504 (1952), the defendant was charged with improperly communicating with a grand jury. Rejecting as a matter of law the defense that

[7] See also the exhaustive opinion of Chief Judge Fee in *United States* v. *Smyth*, 104 F. Supp. 283, 303-304 (N.D. Cal. 1952), in which he indicated that it would be contempt under 18 U. S. C. § 401 for an attorney, without a court order, to interrogate grand jurors about their motives or personal habits; and *In re Grand Jury Proceedings*, 4 F. Supp. 283 (E.D. Penn. 1933), which also indicates that a court order is necessary in order to avoid contempt in questioning grand jurors.

he had acted "openly and without corrupt intent," the court said that under the facts of the case "the only question which can arise under the statute is whether the person accused of sending the letter did so. Every one is presumed to intend the natural and probable consequences of acts intentionally done." Once we find, as we do, that Cammer's conduct tended to harass the grand jurors, it is immaterial whether Cammer was motivated by an evil purpose, or not, but were we pressed on the point we could readily find that he was.

We are not unmindful that "the intention with which acts of contempt have been committed must necessarily and properly have an important bearing on the degree of guilt and the penalty which should be imposed. . . ." *Cooke* v. *United States*, 267 U. S. 517, 538 (1925). Here the appellant had the full benefit of whatever mitigating circumstances could properly be urged in the light of the facts. The *Cooke* case requires no more. See also, *Merrimack River Sav. Bk.* v. *Clay Center*, 219 U. S. 527, 536 (1911); *Schmidt* v. *United States*, 115 F. 2d 394, 398 (6th Cir. 1940).

Chief Judge Laws concluded: "Granting respondent all favorable inferences, his acts clearly disregarded the protection which must be vouchsafed jurors. The Court finds him guilty of contempt and imposes a fine of $100."

The judgment is affirmed.

FAHY, *Circuit Judge, dissenting*: The question is the narrow one whether the conduct for which appellant was adjudged by the court guilty of criminal contempt was that of an officer of the court in an official transaction. The only authority invoked to support the judgment is 18 U. S. C. 401(2) (1952), empowering a court of the United States to punish by fine or imprisonment such contempt of its authority "and none other, as . . . (2) Misbehavior

of any of its officers in their official transactions . . . ." I assume the conduct was misbehavior within the meaning of this provision. And, of course, appellant as a member of the bar is an officer of the court. *Ex parte Garland*, 71 U. S. (4 Wall.) 333, 378; *Savings Bank* v. *Ward*, 100 U. S. 195, 198; *Powell* v. *Alabama*, 287 U. S. 45, 73; *Hickman* v. *Taylor*, 329 U. S. 495, 510;[1] *Booth* v. *Fletcher*, 69 App. D. C. 351, 355, 101 F. 2d 676, 680, *cert. denied*, 307 U. S. 628. But when he communicated by mail with grand jurors to obtain information in preparing his client's case he was not engaging in an official transaction as an officer of the court. In other words, I do not think Congress intended by § 401(2), to grant courts the power by summary proceedings to police such professional behavior of a member of the bar. The well known avenues for suspending, disbarring, or otherwise disciplining attorneys are available to reach their unprofessional and unethical conduct. The criminal law is available to punish them for criminal offenses, where they "will be afforded the normal safeguards surrounding criminal prosecutions." *Nye* v. *United States*, 313 U. S. 33, 53.[2] And contempt proceedings are also available to punish "[m]isbehavior of any person" in the court's presence or "so near thereto as to obstruct the administration of justice", or "[d]isobedience or resistance to" the court's "lawful writ, process, order, rule, decree, or command." 18 U. S. C. § 401(1) and (3) (1952). But the language of § 401(2), "[m]isbehavior of" court officers "in their official transactions", is not apt wording to include a broad sweep of professional behavior of attorneys not in the presence of the court or "so near thereto as to obstruct the administration of justice."

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[1] For subsequent history see *Hickman* v. *Taylor*, 170 F. 2d 327 (3rd Cir.), *cert. denied*, 336 U. S. 906.

[2] For subsequent history see *Nye* v. *United States*, 137 F. 2d 73 (4th Cir.), *cert. denied*, 320 U. S. 755.

The language no doubt does apply to the official conduct of officers of the court, such, for example, as the clerk and marshal; and to referees, trustees, masters, and attorneys in special capacities. Summary power to punish them might have been thought necessary to enable a court to function with propriety and integrity. But to construe § 401(2) to include the conduct here in question is to draw into the words "official transactions" of "officers" of the court an undefined and vague area of the professional activity of an attorney. This is not the ordinary meaning of the language and we should not, in view of *Nye v. United States*, *supra*, extend its meaning beyond the ordinary. Unless the requirements of the statute are clearly satisfied, "an offense will be dealt with as the law deals with the run of illegal acts", *ibid.*, 313 U. S. at p. 51, and not by summary procedure without the protection of the Bill of Rights.

Ex parte Bradley, 74 U. S. (7 Wall.) 364, lends some support to the view of the majority. But the question in its present context was not there decided, and the opinion must now be read in the light of *Nye* v. *United States*, *supra*. See, also, the recent decision in *Offutt* v. *United States*, 348 U. S. 11, 14.

It must be remembered that the seriousness of the behavior, or the fact that it involved grand jurors, does not make it the behavior of a court officer in an official transaction. See *Schmidt* v. *United States*, 124 F. 2d 177 (6th Cir.), which, however, should be read with the earlier case of *Schmidt* v. *United States*, 115 F. 2d 394 (6th Cir.). The official status of the grand jurors is not in question, only the official character of appellant's own status and behavior. I think *Farese* v. *United States*, 209 F. 2d 312 (1st Cir.), particularly at page 315, and the implications of *In re Michael*, 326 U. S. 224, also support my view that the judgment should be reversed.